84-475

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ALEXANDER L. STEVAS,
CLERK

No. _____

In the Supreme Court of the United States

October Term, 1983

LAUGHLIN RECREATIONAL ENTERPRISES, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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23pp

QUESTION PRESENTED

When the government files a condemnation action to acquire property *and*, during the pendency of the proceeding, exercises dominion and control over the property in such a way that the property owner is prevented from making any use of the property, does the Constitution compel the payment of prejudgment interest?

PARTIES

All parties are named in the caption.

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The Petitioner respectfully prays that a Writ of Certiorari issue to review a judgment and order of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The Court of Appeals granted the motion of the United States for summary affirmance, in a belief that such action was compelled by this Court's decision in *Kirby Forest Indus., Inc. v. U.S.* (1984) ____ US ____, 81 L Ed 2d 1. The Order is App. A. An amended Order is App. B.

JURISDICTION

This is an eminent domain case in which approximately 320 acres of vacant land in Laughlin, Nevada were acquired by the United States for expansion of the Lake Mead National Recreation Area. The property was owned by Petitioner Laughlin Recreational Enterprises, Inc. (the Property Owner).

As the property was to be included in a recreation area, the United States wanted it to remain vacant.

A lis pendens was filed at the time the complaint was filed. While no Declaration of taking was filed, and no order authorizing possession was obtained, federal officials watched the property as though it were already federally owned. They cited one of the Property Owner's expert witnesses for supposedly "trespassing and destroying a natural feature" when he entered the subject property and attempted to drill a small hole to learn water depth to enable himself to present evidence at the trial below.

Federal policy called for obtaining immediate title transfer and physical possession if any development was attempted.

Federal policy also prohibited gambling on the subject property, although gambling is otherwise legal in Nevada. The Property Owner would have used the property in part for gambling.

The Property Owner was prevented from making any use of its land from the time the complaint was filed in 1976 to the entry of judgment in 1983.

For this loss of use, the Property Owner sought compensation in the form of prejudgment interest. The District Court, though acknowledging that the Property Owner had suffered damage because of the lost ability to use the property since 1976, believed it had no power to award prejudgment interest.

The District Court's judgment (App. C) was filed April 12, 1983.

The judgment of the Court of Appeals (App. A) was filed June 25, 1984. An amended version (App. B) was filed June 29, 1984.

This Court's jurisdiction is invoked pursuant to 28 USC §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

This case involves:

- the Fifth Amendment to the U.S. Constitution;
- 40 USC §257; and
- 36 CFR §2.15.

All are reproduced in App. D.

STATEMENT OF THE CASE

Laughlin, Nevada is situated on the Colorado River in the southeastern part of the state. The river forms the boundary between Nevada and Arizona. Laughlin is 99 miles from Las Vegas. (RT 87, 89, 75)

The Property Owner began acquiring land in what is now known as Laughlin, Nevada[1] in 1966. (RT 75-76) At that time, there was little development other than one recently closed slot machine club. (RT 75) By the time of trial, significant development had occurred. There were

---

[1] The name "Laughlin" appears in three contexts in this record. The subject property was owned by Laughlin Recreational Enterprises, Inc., whose president is Donald Laughlin. The name of the community is also Laughlin. That name was chosen by the U.S. Postal Service in preference to alternatives suggested by Mr. Laughlin. (RT 79) To avoid confusion, the community will be referred to in this Petition as Laughlin and the corporation as the Property Owner.

seven casinos, with two more in prospect. (RT 76) Between 3,500 and 4,000 people earned their living in Laughlin. (RT 76)

Laughlin has only 65 residential units to house those thousands of employees. (RT 93) The bulk of the working population must commute 12-25 miles each day from across the river in Arizona. (RT 78) There are no significant retail commercial facilities (e.g., grocery and department stores) in Laughlin. (RT 80)

To say there is a need for housing and general commercial development in Laughlin would be understatement. (RT 78, 93-95) In recognition, the County's general plan calls for such development. (RT 94)

The highest and best use of the subject property was residential and commercial development to satisfy those needs. There would also have been some gambling. (RT 96, 275-276) In fact, these 320 acres comprised most of the privately owned property in the vicinity. Virtually all other property is owned by various government agencies or Indian Tribe reservations. (RT 87-88; Exhibit A) To supply needed housing after the taking of the subject property, one or more of the governmental landowners will have to sell property. (RT 179)

The subject property has not been developed to meet those needs but, instead, has remained vacant and unused because of the government's pending acquisition. (RT 77)[2]

---

[2]Most of the facts discussed hereafter were the subjects of offers of proof because of the District Court's determination that prejudgment interest could not, as a matter of law, be awarded. The parties stipulated that if it were decided on appeal that interest could be awarded, the appropriate rate would be decided on remand by the District Court sitting without a jury. (RT 257, 367)

The property was described by the government's appraiser as "land-locked" (RT 267), although gaining access would not have been difficult. (RT 101)

In federal bureaucratese, the subject property is an "in-holding," as it is property within the boundaries of a federally owned park or recreation area, but privately owned. (See RT 352, 373-374.)

The government has had a long-standing policy of not permitting further development of "in-holding" property. For at least the last 10 years, any time the owner of "in-holding" property has sought to put any improvements on his land, the policy has caused the government to immediately file a declaration of taking (40 USC §258a), which transfers title to the government. (RT 374)

In the teeth of that settled policy, it would have been both pointless and senseless for the Property Owner to expend the large sums required to plan development of the 320 acres and obtain the necessary approval of local government agencies. Before the first spadeful of dirt could be moved, the United States would have acquired title to the property. (RT 374-375)[3]

Moreover, as soon as the complaint was filed on October 15, 1976, the government filed a lis pendens. From that time, the government acted as though it already owned the subject property. An illustration of that attitude of federal dominion occurred several months before trial. A major issue which the Property Owner anticipated was whether the subject property contained its own water supply.[4] The Property Owner sent its hydrologist, Dr.

---

[3]This alone distinguishes the case from *Kirby*. There, the use the owner might have made was simply cutting trees. (____ US at ____, 81 L Ed 2d at 14) No detailed, expensive planning is required to cut trees. It is to develop 320 acres of vacant land.

[4]This was the second trial of this case. The District Court had

Wyman, onto property it supposedly still owned to drill a test hole to determine the depth of the water table. When Dr. Wyman did so two different federal officers, on two different occasions, cited him for trespassing on the land and destroying a natural feature. (RT 234-235, 248-249)

Finally, though the property was supposedly privately owned, the government exercised control over it through 36 CFR §2.15, which prohibits gambling activities (legal in Nevada) because the property is surrounded by federally owned land. (RT 423) The gambling prohibition is extensively discussed in the District Court's October 3, 1980 Order Granting Plaintiff's Motion For A New Trial after the first trial. The importance of that governmental control was the basis for the new trial order. (The order is reported as *U.S. v. 319.88 Acres* [D Nev 1980] 498 F.Supp 763.)

Thus, by filing the lis pendens, prohibiting gambling on the subject property, establishing a policy of immediate condemnation if development were requested, and exercising dominion over the subject property by criminal process as though it were already federally owned, the United States prevented any use of the subject property since at least October 15, 1976.

The District Court acknowledged both the unfairness of its ruling denying interest and that the government's actions caused damage to the Property Owner:

> "It is not that I don't share the property owner's view that tieing up the property this way all this time is detrimental, there is no question it is detrimental." (RT 368)

---

granted a new trial on the government's motion. The water supply issue had been hotly contested at the first trial.

> "And, all this does create an economic hardship and does reduce the value of the land to the landowner. There is no question about it. But, it seems to me that this is a policy question. You are attempting to get around the hardships of the policy by interest and I don't think we can do that." (RT 370-371)
>
> "I don't know exactly — I don't want the record to be erroneous here; I don't say that I have in mind a specific injury or specific dollar amounts for Mr. Laughlin. But, I can see, having tied up all this property all this time, he has suffered some economic injury. We don't have in the record what this is." (RT 375)

The District Court denied any prejudgment interest (RT 367) and entered judgment on the jury's verdict for the fair market value of the property.

The District Court's view that Congress determines what is just compensation (RT 369-370) was the basis for denying compensation for the years of nonuse.

Because it has long been established that interest is part of just compensation, and the determination of just compensation is a matter for the judiciary rather than Congress, the Property Owner appealed. On appeal, neither side questioned the jury's determination of fair market value.

During the pendency of the appeal, this Court decided *Kirby Forest Indus., Inc. v. U.S.* (1984) ____ US ____, 81 L Ed 2d 1. This Court concluded that where the government does *not* take possession *and* takes *no action* which restricts the owner's ability to use his property, prejudgment interest is not Constitutionally required.

Believing this case controlled by *Kirby,* the Court of Appeals summarily affirmed, without either oral argument or an explanatory opinion.

THIS CASE IS NOT CONTROLLED BY *KIRBY.* IT IS THE NEXT STEP BEYOND *KIRBY.*

When this Court decided *Kirby* last Term, it dealt with a time-consuming condemnation project in which the government took *no* specific action against the property:

- it did not take possession;
- it did not exercise dominion or control;
- it did not prevent the owner from using the land as he would have in the absence of the pending condemnation.

Those are *not* the facts at bench.

This case is the next step *beyond Kirby.* Here, the government *did* take specific action which demonstrated federal dominion and control and prevented the use of the subject property:

- *First,* the Government prohibited entry on the subject property and cited "violators" for criminal trespass. When an expert witness hired by the Property Owner went on the subject property, at the Property Owner's request, to investigate in preparation of his testimony for trial, he was *twice* criminally cited by *two* different federal officers. (RT 234-235, 248-249)
- *Second,* the Government forbade gambling (legal in Nevada) on the subject property through 36 CFR §2.15. (RT 423) But for that prohibition, the highest and best use of the subject property would have included some gambling. (See the

> District Court's opinion granting the government a new trial in this case because of this issue in *U.S. v. 319.88 Acres* [D Nev 1980] 498 F.Supp. 763.)

In *Kirby,* this Court did not need to address the question of whether prejudgment interest is appropriate when the government exercises dominion and control and deprives the owner of his rights by criminal process. That question is squarely presented at bench. It is the right shoe to *Kirby's* left, and merits a decision so that, between the two cases, the law on this subject will be settled.

Kirby said when interest is not proper. This case will tell when it is.

AT A MINIMUM, THIS CASE OUGHT TO BE REMANDED TO THE COURT OF APPEALS WITH DIRECTIONS TO RECONSIDER ITS SUPERFICIAL READING OF *KIRBY*.

The Court of Appeals gave this case short shrift:

- there was no oral argument;
- there was no explanatory opinion.

The Court of Appeals simply granted the government's motion for summary affirmance and entered a brief order citing *Kirby.*

But, as this Court is aware, *Kirby* was based on its specific facts. As this Court said:

> "*If* petitioner's depiction of the impairment of its beneficial interests during the pendency of the condemnation suit were accurate, *we would find its constitutional argument compelling.* We have frequently recognized that a radical curtailment of a landowner's freedom to make use of or ability to derive income from his land may give

> rise to a taking within the meaning of the Fifth Amendment, even if the Government has not physically intruded upon the premises or acquired a legal interest in the property. . . .
>
> "*However,* we do not find, prior to the payment of the condemnation award in this case, an interference with petitioner's property interests severe enough to give rise to a taking under the foregoing theory. Until title passed to the United States, *petitioner was free* to make whatever use it pleased of its property. The *Government never forbade* petitioner to cut the trees on the land or to develop the tract in some other way. Indeed, petitioner is unable to point to *any* statutory provision that would have authorized the Government to restrict petitioner's usage of the property prior to payment of the award." (*Kirby,* ____ US at ____, 81 L Ed 2d at 13, emphasis added.)

A reasoned opinion by the Court of Appeals would have to deal with the factual differences between this case and *Kirby.* For, here, there *was* governmental interference. The District Court so found. There was an imposition of government control by citing the Property Owner's employee for "trespassing" when he went on supposedly private property and by the prohibition of gambling, an activity otherwise legal on private property in Nevada.

If this Court believes the case does not warrant its plenary consideration, the Property Owner asks that it be remanded to the Court of Appeals for *proper* consideration in light of *Kirby.*

CONCLUSION

This case represents the next logical step following *Kirby.* It gives either this Court or the Court of Appeals

(on remand) the opportunity to address the necessity of prejudgment interest when the government exercises dominion and control over property being condemned before the government actually buys it.

The Property Owner prays that a writ issue.

Respectfully submitted,

DONALD L. WOOD
and
JERROLD A. FADEM
MICHAEL M. BERGER
FADEM, BERGER & NORTON

By MICHAEL M. BERGER
Attorneys for Petitioner
Laughlin Recreational Enterprises, Inc.

APPENDIX

RECEIVED AND FILED
JUL 19 1 12 PM '84
FILED
JUN 25 1984
PHILLIP B. WINBERRY
CLERK, U.S COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. 319.88 ACRES OF LAND, MORE OR LESS IN CLARK COUNTY, NEVADA, et al., Defendants, LAUGHLIN RECREATIONAL ENTERPRISES, INC., Defendant-Appellant.	No. 83-2080 DC# CV-LV-76 -0199 RDF Nevada (Las Vegas) ORDER

Before: HUG, POOLE and NELSON, Circuit Judges

Appellee's motion for summary affirmance is granted. *Kirby Forest Industries, Inc. v. United States,* 52 U.S.L.W. 4607 (S.Ct. May 21, 1984).

A TRUE COPY
ATTEST JUL 17 1984
PHILLIP B. WINBERRY
Clerk of Court
by: Deputy Clerk

MoCal 6/18/84

APPENDIX A

JUL 19 1 PM '84
FILED
JUL 20 1984
PHILLIP B. WINBERRY
CLERK U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. 319.88 ACRES OF LAND, MORE OR LESS IN CLARK COUNTY, NEVADA, et al., LAUGHLIN RECREATIONAL ENTERPRISES, INC., Defendant-Appellant.	No. 83-2080 DC# CV-LV-76 -0199 RDF Nevada (Las Vegas) AMENDED ORDER

Before: HUG, POOLE and NELSON, Circuit Judges

Appellee's motion for summary affirmance is granted. *Kirby Forest Industries, Inc. v United States,* 52 U.S.L.W. 4607 (S.Ct. May 21, 1984).

Any redetermination of the value of the land because of any increase in value since the judgment was entered in April of 1983 and the time of actual taking, can be sought by appellant at the time under Fed. R. Civ. R. 60(b) as provided in *Kirby.* No remand is necessary.

McCal 6/18/84

A TRUE COPY
ATTEST JUL 17 1984
PHILLIP B. WINBERRY
Clerk of Court
by: _____
Deputy Clerk

RECEIVED JUL 26 1984

JUDGMENT IN A CIVIL CASE

United States District Court	DISTRICT NEVADA
CASE TITLE UNITED STATES OF AMERICA v. 319.88 ACRES OF LAND, etc, et al	DOCKET NUMBER CV-LV-76-199-RDF NAME OF JUDGE OR MAGISTRATE ROGER D. FOLEY

☑ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☐ Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That the fair market value of subject property is $991,628.00.

APR 12 1 15 PM '83

CAROL C FITZGERALD
CLERK
BY Harriet D Jefferson
DEPUTY

ENTERED

APR 12 1983

CLERK, U.S. DISTRICT COURT
DISTRICT OF NEVADA
BY Harriet D Jefferson DEPUTY

CLERK
CAROL C. FITZGERALD

(BY) DEPUTY CLERK
Harriet D. Jefferson

DATE
4/12/83

APPENDIX C

U.S. Constitution
5th Amendment

". . . nor shall private property be taken for public use, without just compensation."

40 USC §257

"In every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses, he may acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this section and section 258 of this title, or such other officer, shall cause proceedings to be commenced for condemnation within thirty days from receipt of the application at the Department of Justice."

36 CFR §2.15

"Gambling in any form, or the operation of gambling devices, whether for merchandise or otherwise, is prohibited on the federally owned lands of a park area, and on privately owned lands within park areas under the legislative jursidiction of the United States."

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on September 21, 1984, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, U.S. Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and 40 copies)

Solicitor General
Department of Justice
Washington, D.C. 20530

Kathleen P. Dewey
David C. Shilton
Room 2339
10th and Constitution Avenue, N.W.
Washington, D.C. 20530

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 21, 1984, at Los Angeles, California.

Joy Rivelli Miller
(Original signed)

Office-Supreme Court, U.S.
FILED
OCT 23 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-475

In the Supreme Court of the United States

OCTOBER TERM, 1984

LAUGHLIN RECREATIONAL ENTERPRISES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the landowner is entitled to interest in this straight condemnation case.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-475

LAUGHLIN RECREATIONAL ENTERPRISES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the court of appeals (Pet. App. A2) is unreported. The district court did not issue an opinion.

JURISDICTION

The judgment of the court of appeals (Pet. App. A1) was entered on June 25, 1984, and amended on June 29, 1984 (Pet. App. A2). The petition for a writ of certiorari was filed on September 24, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1964, Congress enacted 16 U.S.C. 460n-1 (Pub. L. No. 88-639, 78 Stat. 1039) which established the Lake Mead National Recreation Area. The boundaries of the area were identified by reference to a specified 1963 boundary map. The statute stated that: "The Secretary may accept donations of land and interests in land within the exterior

boundaries of such area, or such property may be procured by the Secretary in such manner as he shall consider to be in the public interest."

Petitioner began purchasing the land condemned in this case after the boundaries of the Recreation Area had been set.[1] The parcel held by petitioner lies within those boundaries (Tr. 352, 373-374) and is completely surrounded by government-owned land (Tr. 267-268).

The United States instituted this eminent domain proceeding on October 15, 1976, pursuant to 40 U.S.C. 257. Title and possession of the property has at all times remained in petitioner. Petitioner filed a counterclaim for inverse condemnation (C.R. 6, 34, 38),[2] asserting that the government had taken its land by denying access across government land acceptable to the company (C.R. 6, at 7). Petitioner requested just compensation and interest from 1966.[3] The magistrate granted the government's motion to dismiss this counterclaim and the district court upheld the order (C.R. 20, 32, 43).

Two trials were held in this case. The first trial resulted in a judgment of $880,000, using a valuation date of March 1980 (C.R. 99). Thereafter, the district court granted the government's motion for a new trial (498 F. Supp. 763 (D. Nev. 1980)), finding that the jury award was erroneously based upon use of the land for gambling, a use prohibited on privately owned lands within federal park areas (36

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[1]The actual date of acquisition is unclear. Petitioner states in its petition (Pet. 3) that it began acquisition in 1966, and petitioner's president so testified (Tr. 75-76). At trial in April 1983, petitioner's counsel stated that the 320-acre tract here at issue was purchased 13 or 14 years previously (Tr. 67, 236). In any event, it is undisputed that the acquisition began no earlier than 1966.

[2]"C.R." refers to the clerk's record in the court of appeals.

[3]See note 1, *supra*.

C.F.R. 2.15 (1982)).[4] At the second trial, the jury set just compensation at $991,628 (Pet. App. A3), based on residential and light commercial use of the land (Tr. 96, 275). The valuation date was April 5-6, 1983, the date of trial (Tr. 245, 277-278).

In addition to the jury's award, petitioner sought an award of interest from October 15, 1976, the date the complaint was filed (Tr. 226). The district court denied this claim (Tr. 256, 367) and petitioner appealed.

After briefs were filed, the court of appeals granted the government's motion to defer consideration of the case pending this Court's decision in *Kirby Forest Industries, Inc.* v. *United States,* No. 82-1994 (May 21, 1984). Following the decision in that case holding that no interest is due before the government takes possession of the property in a typical straight condemnation case, the United States filed a motion for summary affirmance, which the court of appeals granted (Pet. App. A1-A2). Petitioner seeks review of that decision.

ARGUMENT

The decision of the court of appeals correctly applied *Kirby Forest Industries, Inc.* v. *United States, supra,* does not conflict with any other decision of this Court or any other court of appeals, and does not warrant further review.

Petitioner cites four instances of alleged governmental control over its land, seeking to bring its case outside the purview of the rule enunciated in *Kirby Forest Industries* last Term. None of these contentions is well founded.

1. Petitioner first asserts (Pet. 6) that by filing a notice of *lis pendens,* the government exerted control over its

---

[4]This regulation is currently codified at 36 C.F.R. 2.36.

property.[5] The petitioner in *Kirby Forest Industries* pressed the identical argument and this Court flatly rejected it (slip op. 11-14). It is thus clear that a notice of *lis pendens*, which is simply a notice of pending litigation (*Allstate Finance Corp.* v. *Zimmerman*, 272 F.2d 323, 325 (5th Cir. 1959)), does not, of itself, constitute a taking.

2. Petitioner next contends (Pet. 6, 8) that 36 C.F.R. 2.15 (1982), which prohibits gambling inside the boundaries of the Recreation Area, effected a taking of its land. Petitioner argues that but for the regulation, the highest and best use of its propery would have been gambling. Prohibition of the assertedly more valuable use of gambling constituted a taking, in petitioner's view. This argument ignores the fact that the cases "uniformly reject the proposition that diminution in property value, standing alone, can establish a taking." *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 131 (1978). This Court has refused to find takings where the value of property has been diminished by as much as 75%, *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926), and 87½%, *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915). As the Court wrote in *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 592 (1962):

> If [an] ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it [an] unconstitutional [taking].

Thus, there is no merit to petitioner's argument that the prohibition of gambling on its property constituted a taking.

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[5]Of course, if petitioner were correct that the property was taken when the *lis pendens* notice was filed in 1976, the jury award of $991,628, which was based on land values at the date of the trial in 1983, would have to be set aside, and a new figure set based on 1976 values. There is no theory under which petitioner would be entitled both to the value of the land in 1983 and to interest on that value from 1976.

3. Petitioner also alleges (Pet. 5-6) that the United States took the property through a policy of immediately filing a declaration of taking when an owner of land involved in a straight condemnation case threatens to improve the land. Once again, this argument was conclusively rejected by this Court last Term in *Kirby Forest Industries* (slip op. 14):

> It is true that any effort by petitioner to develop the land probably would have prompted the Government to exercise its authority, under 40 U.S.C. § 258a, to file a declaration of taking and thereby peremptorily to appropriate the tract in order to protect it from alteration. But the likelihood that the United States would have responded in that fashion to an attempt by petitioner to make productive use of the land weakens rather than strengthens petitioner's position, because it suggests that petitioner had the option, at any time, to precipitate an immediate taking of the land and to obtain compensation therefor as of that date, merely by informing the Government of its intention to cut down the trees.

Similarly in this case, if, as petitioner contends (Pet. 2), "federal officials watched the property as though it were already federally owned," petitioner could have precipitated an immediate taking by any actions suggesting an intent to develop it.[6]

Moreover, in considering whether a taking has occurred, one factor considered by the courts is whether the government has interfered with reasonable investment-backed expectations. *Prune Yard Shopping Center* v. *Robins*, 447

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[6]Contrary to petitioner's contention (Pet. 5), there was no need for it to "expend the large sums required to plan development of the 320 acres" before it took steps that would precipitate a taking. Instead, here as in *Kirby Forest Industries*, notice of an intent to cut trees would probably have been sufficient.

U.S. 74, 83 (1980). In this case, petitioner could have had no reasonable investment-backed plans to develop its property. When petitioner purchased the land, it knew it was buying a landlocked parcel located within the boundaries of the Lake Mead National Recreation Area. 16 U.S.C. 460n-1. In the statute creating the area, Congress expressly provided that the Secretary could procure land within the area "in such manner as he shall consider to be in the public interest." *Ibid.* Thus, as in *Ruckelshaus* v. *Monsanto Co.*, No. 83-196 (June 26, 1984), in light of the statute in existence at the date of purchase, petitioner could not reasonably have expected to develop this land.

4. Petitioner's final allegation (Pet. 6, 8) of the exercise of federal dominion over its land concerns two citations for trespass.[7] What petitioner has failed to reveal, however, is that the citations were issued for trespass on the government-owned land surrounding petitioner's land.[8] The government's protection of its own land can scarcely amount to a taking of petitioner's land.

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[7]The citations eventually were cancelled and no fines were ever collected for the violations.

[8]Two men drove a Caterpillar tractor off a road and across government-owned property, thereby destroying natural vegetation, even though they could have reached petitioner's property without leaving the road. Copies of the citations were never formally offered into evidence at trial; we are lodging the Park Service's case incident report, and a map showing the area involved, with the Clerk of this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 84-475

In the Supreme Court of the United States

OCTOBER TERM, 1984

LAUGHLIN RECREATIONAL ENTERPRISES, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND OBJECTION TO GOVERNMENT'S EX PARTE SUBMISSION OF EVIDENCE

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INTRODUCTION

The Government's Brief in Opposition is a disservice to this Court:

- It ignores the rationale of *Kirby Forest Indus., Inc. v. U.S.* (1984) ____US____, 81 L Ed 2d 1.

- It seeks to examine each of the Government's actions in *isolation*, rather than analyzing their *combined* effect on the subject property.
- It improperly seeks to place hearsay evidence (which is not part of the trial court record) before this Court without even supplying the Petitioner with a copy of what it lodged.

The Government's Brief in Opposition demonstrates a need to grant the Petition so the Government may be informed of the limits of its power. Obviously, it refuses to learn from *Kirby*.

KIRBY DEMONSTRATES A NEED FOR FURTHER CONSIDERATION BY THIS COURT OR REMAND TO THE COURT OF APPEALS

The Government's assertion that the Court of Appeals properly applied *Kirby* (br. in Opp., p 3) is plainly in error.

In *Kirby*, this Court expressed grave concern with the treatment accorded those whose property is being condemned for the greater public good, and noted:

> "*If* petitioner's depiction of the impairment of its beneficial interests during the pendency of the condemnation suit were accurate, *we would find its constitutional argument compelling.*" (*Kirby*, ___ US at ___, 81 L Ed 2d at 13; emphasis added.)

The facts at bench go beyond *Kirby*. As the District Court plainly acknowledged:

> "It is not that I don't share the property owner's view that tieing up the property this way

all this time is detrimental, *there is no question it is detrimental.*" (RT 368; emphasis added.)

"And, *all this does create an economic hardship* and does reduce the value of the land to the landowner. There is no question about it. But, it seems to me that this is a policy question. You are attempting to get around the hardships of the policy by interest and I don't think we can do that." (RT 370-371; emphasis added.)

"I don't know exactly — I don't want the record to be erroneous here; I don't say that I have in mind a specific injury or specific dollar amounts for Mr. Laughlin. But, I can see, *having tied up all this property all this time, he has suffered some economic injury.* We don't have in the record what this is." (RT 375; emphasis added.)

In addition, there was the use of criminal sanctions to prevent Laughlin's agents from going on Laughlin's property or to test drill on Laughlin's property. To add insult to injury, the agents' visits were needed to obtain evidence of ground water levels for trial. This was Government interference with the judicial process and an attempt to deny a fair trial.

Consideration of the facts by this Court will flesh out the *Kirby* rule by explaining what governmental actions *do* lead to liability. At a minimum, full consideration by the Court of Appeals (rather than summary affirmance without analysis) seems in order.

ALL THE FACTS MUST BE CONSIDERED TOGETHER TO DETERMINE THEIR IMPACT

This Court has been unable to determine any set formula for evaluating the impact of governmental actions on property to determine whether compensation is Constitutionally compelled. Rather, the totality of the circumstances has been examined to determine the impact. (E.g., *Ruckelshaus v. Monsanto Co.* [1984] ___ US ____, 81 L Ed 2d 815, 834 [collecting numerous cases].)

The Government ignores this rule.

Rather than examining the collective impact of the totality of its actions, the Government prefers to examine each in isolation, concluding that none — considered by itself — requires compensation. (Br. in Opp., pp 3-6)

That sort of baloney-slicing technique is precisely what this Court has repeatedly said is wrong. Apparently the Government needs another express message to keep its sliced baloney out of court.

OBJECTION TO EX PARTE SUBMISSION OF HEARSAY EVIDENCE NEVER PROFFERED TO THE DISTRICT COURT

Apparently feeling some concern that the record in this case leaves it vulnerable, the Government has lodged with this Court its "incident report" and a map of the "area involved." (Br. in Opp., p 6, fn 8)

That ex parte submission of self serving hearsay is submitted to "prove" that the property owner's agents were cited for trespassing on Government land, not on the subject property.

But the offers of proof (and the actual citations which were lodged with the District Court) show otherwise. They show that the Government exercised dominion over the subject property *before* trial by citing the property owner's expert witness for trespassing *on the subject property* and destroying a natural feature by drilling to determine the depth of the water table *on the subject property.*

The Government's "incident report" is not only hearsay, it is contrary to the offers of proof made in the District Court. Please recall that it was the Government's objection that kept this issue from being fully tried below. It is outrageous overreaching by the Government to attempt to fill this Government-created void by supplying inadmissible hearsay at this level.

Moreover, the Government failed even to display sufficient ethical courtesy to serve a copy of its submission on Petitioner's counsel. That disables Laughlin from analyzing the report.

This issue is one for trial in the District Court after remand. For now, the record is what it is, per the rejected offer of proof.

Petitioner objects to the submission and its consideration at this time. Petitioner suggests this further Government attempt to deny a fair hearing deserves sanctions.

CONCLUSION

The Government refuses to face reality.

Its actions unconstitutionally injured Petitioner.

Further consideration of the issues raised in *Kirby* is deserved.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on November 1, 1984, I served the within *Reply Brief in Support of Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, U.S. Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

Solicitor General
Department of Justice
Washington, D.C. 20530

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I declare under penalty of perjury that the foregoing is true and correct. Executed on November 1,1984, at Los Angeles, California.

Sharon Stewart
(Original signed)